IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 09-cr-00369-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. SHAWN RICHARD MERRIMAN,

Defendant.

PLEA AGREEMENT AND STATEMENT OF FACTS
RELEVANT TO SENTENCING

The United States of America (the government), by and through Tim R. Neff and Thomas M. O'Rourke, Assistant United States Attorneys for the District of Colorado, and the defendant Shawn Richard Merriman, personally and by counsel, Patrick L. Ridley, submit the following Plea Agreement and Statement of Facts Relevant to Sentencing pursuant to D.C.COLO.LCrR 11.1.

I. PLEA AGREEMENT

Mr. Merriman agrees to waive his right to have this matter presented to a grand jury and to plead guilty to Count 1 of the Information, charging a violation of Title 18, United States Code, Section 1341 (mail fraud).

Mr. Merriman also agrees to admit the allegations in Count 2 (forfeiture) of the Information and to forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture under Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c),

whether in the possession or control of the United States or in the possession or control of the defendant or his nominees. Mr. Merriman agrees that the assets and property to be forfeited include but are not limited to all assets and property identified in the government's amended verified forfeiture complaint in the District of Colorado case entitled *United States v. Old Masters Fine Art et al.*, Case No. 09-cv-00753-MSK-CBS.

Mr. Merriman consents to a money judgment in the amount of the proceeds that he obtained as a result of the violation of Title 18, United States Code, Section 1341, and related conduct, as described herein, less the amount of funds recovered from assets and property that were directly traceable to proceeds obtained as a result of that violation and that have been, or will be, forfeited criminally or civilly.

Mr. Merriman agrees and consents to the forfeiture of these assets and property pursuant to any federal criminal, civil, and/or administrative forfeiture action.

Mr. Merriman agrees that the forfeiture described herein is not excessive.

Mr. Merriman agrees that the conduct described below provides a sufficient factual and statutory basis for the forfeiture of the assets and property described above.

Mr. Merriman agrees that for purposes of Rule 32.2(b)(1)(A) of the Federal Rules of Criminal Procedure the government has established the requisite nexus between the assets and property listed above and the offense to which he is pleading guilty.

Mr. Merriman agrees that he will not object to this court entering a preliminary order of forfeiture pursuant to Rule 32.2(b)(2)(A) of the Federal Rules of Criminal Procedure.

Mr. Merriman consents pursuant to Rule 32.2(b)(4)(A) of the Federal Rules of Criminal Procedure that the preliminary order of forfeiture shall be final as to him at the

time it is entered notwithstanding the requirement that it be made a part of the sentence and be included in the judgment.

Mr. Merriman agrees to continue to take all steps necessary to locate any and all assets and property subject to forfeiture and to pass title to such assets and property to the United States before his sentencing. Mr. Merriman agrees that these steps will include, but will not be limited to, the surrender of title, the signing of a consent decree of forfeiture and the signing of any other documents necessary to effectuate such transfers. Mr. Merriman agrees to continue to fully assist the government in the recovery of any assets or property or portions thereof, as described above, wherever located. Mr. Merriman agrees to continue to make a full and complete disclosure of all assets and property over which he exercises control and any assets or property that are held or controlled by a nominee of Mr. Merriman.

Mr. Merriman agrees that the government is not limited to the forfeiture of the assets and property described above. Mr. Merriman agrees that if the government determines that assets or property of the defendant identified for forfeiture cannot be located upon the exercise of due diligence; have been transferred or sold to, or deposited with, a third party; have been placed beyond the jurisdiction of the court; have been substantially diminished in value; or have been commingled with other property that cannot be divided without difficulty, then the United States shall, at its option, be entitled to forfeiture of any other assets or property (substitute assets) of the defendant up to the value of any assets and property described above.

The United States Attorney's Office for the District of Colorado agrees to make its best efforts to convert, by the remission and/or restoration processes, the proceeds

of forfeited assets to restitution for victims identified in a restitution order in this case. The United States Attorney's Office for the District of Colorado agrees that it will recommend to the Attorney General of the United States the restoration of forfeited funds to any person who is named in a restitution order in this case and who qualifies as a victim pursuant to the applicable regulations or to recommend remission to any such person who submits a petition for remission, provided that the petition and the person comply with, and qualify under, the appropriate regulations.

The government's position is that in the event that the Attorney General refuses to grant any such petitions that may be filed by the victims in this case, forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment or any other penalty that this court might impose in this case. Mr. Merriman does not agree with this position.

The government agrees that it will file a motion pursuant to United States Sentencing Guidelines Section 5K2.16, asking the court to depart downward from the otherwise applicable advisory sentencing guidelines because Mr. Merriman voluntarily disclosed, and accepted responsibility for, the offense prior to the discovery of such offense and such offense unlikely would have been discovered otherwise. The defendant understands that the amount of departure requested in the motion will be entirely within the discretion of the government.

The government agrees that it will not initiate any other federal criminal charges on the basis of the conduct described below.

This is an agreement pursuant to Rule 11(c)(1)(A) and (B) of the Federal Rules of Criminal Procedure.

II. ESSENTIAL ELEMENTS

The essential elements of the offense charged in Count 1 of the Information are: (1) Mr. Merriman knowingly devised or intended to devise a scheme to defraud or to obtain money through false or fraudulent pretenses, representations or promises, (2) Mr. Merriman acted with specific intent to defraud or to obtain money by false pretenses, representations or promises, (3) Mr. Merriman mailed something or caused another person to mail something through the United States Postal Service or a private or commercial interstate carrier for the purpose of carrying out the scheme, and (4) the scheme employed false representations that were material or false or fraudulent pretenses, representations or promises that were material. 10th Cir. Crim. Jury Instr. 2.56 (2005).

III. STATUTORY PENALTIES

The maximum statutory penalty for a violation of Title 18, United States Code, Section 1341, is not more than 20 years' imprisonment, a fine of not more than $250,000, or both a fine and imprisonment; a term of supervised release of not more than three years; a $100 special assessment fee; restitution; and forfeiture.

The conviction may cause the loss of civil rights, including but not limited to the rights to possess firearms, vote, hold elected office and sit on a jury.

A violation of the conditions of probation or supervised release may result in a separate prison sentence.

IV. STIPULATION OF FACTUAL BASIS AND FACTS RELEVANT TO SENTENCING

The parties agree that there is no dispute as to the material elements that establish a factual basis of the offense of conviction.

Pertinent facts are set out below in order to provide a factual basis for the plea and to provide facts that the parties believe are relevant, pursuant to §1B1.3, for computing the appropriate advisory guideline range. To the extent the parties disagree about the facts relevant to sentencing, the statement of facts identifies which facts are known to be in dispute at the time of the plea. (§6B1.4(b))

The statement of facts herein does not preclude either party from presenting and arguing, for sentencing purposes, additional facts or factors not included herein that are relevant to the advisory guideline computation (§1B1.3) or to sentencing in general (§1B1.4). In "determining the factual basis for the sentence, the Court will consider the stipulation [of the parties], together with the results of the presentence investigation, and any other relevant information." (§6B1.4 Comm.)

The government's evidence would show that the date on which conduct relevant to the offense (§1B1.3) began was on or about June 1, 1994.

The government's evidence would be the following:

From about May 1990 to about November 1993, the defendant Shawn Richard Merriman worked as a stockbroker at three different firms in Colorado. In early 1994, Mr. Merriman started his own business, which he operated at all relevant times from his home in Aurora, Colorado.

Mr. Merriman initially operated this business under the name Mountain Springs Partners, L.P. He was the managing partner of this firm, and four other men, who each invested $100,000, were limited partners. Mr. Merriman and those men agreed that he would use their money to buy and sell shares of stock, employing an aggressive day-trading strategy. Under the arrangement, if the trading resulted in profits, he would receive a percentage of the profits as compensation. Mr. Merriman agreed to provide reports summarizing the stock transactions to the limited partners.

Within the first six months of accepting funds from this group of investors, Mr. Merriman's trading activities resulted in a loss, but nevertheless he prepared and delivered to his partners a report on which he deliberately did not disclose the losses and stated falsely that the trading had resulted in a profit.

In about January 1995, Mr. Merriman formed a limited liability corporation known as LLC-1, which was designed to use a different strategy to buy and sell securities. Two of his partners from Mountain Springs Partners invested $100,000 each in LLC-1, and another person invested $17,000. Mr. Merriman did some initial trading under LLC-1 but was not successful.

At about the same time that Mr. Merriman formed LLC-1, he converted Mountain Springs Partners into a limited liability corporation known as LLC-2. Between 1995 and about 2002, Mr. Merriman formed three other limited liability companies: Marque LLC-3, LLC-4 and LLC-5, each of which included a group of investors. Mr. Merriman represented to the investors that he would use their money to buy and sell securities, employing a different strategy with each company, and that the investors would share the

profits made through his trading. Participation in each limited liability company required a minimum investment, usually $50,000 to $200,000.

Mr. Merriman represented to potential investors that he engaged in market analysis and that he had strategies for trading securities. He told many potential investors that his strategies would result in profits of seven percent to twenty-five percent per year. Between 1994 and 2009, more than one hundred individuals and entities invested in the initial partnership and the limited liability companies. The investors resided in Colorado and other states. They included members of Mr. Merriman's family, neighbors, acquaintances and others who were referred to him. In some cases, these people used money from family trusts and individual retirement accounts to invest with Mr. Merriman. The investors' money was deposited into accounts in the partnership's and the limited liability companies' names at banks in Colorado. Mr. Merriman was the only person with signature authority over the accounts.

Each time an investor joined one of the limited liability companies, the investor and Merriman signed an Operating Agreement, which stated that the principal purpose of the company was "to manage money, to invest in securities, including options, and to engage in all activities related or incident to these purposes." Each agreement said Merriman would be the manager of the company and would make all decisions on behalf of the company, including deciding what securities to buy and sell and when to buy and sell them.

The agreements provided that Mr. Merriman would receive a certain percentage of the net profits – twenty percent or more – from the trading activity as compensation.

Under the agreements, Mr. Merriman was to cover operating expenses out of these management allocations.

Between about 1995 and about 2004, Mr. Merriman used some of the investors' money to buy and sell stock, as called for in the operating agreements, but he more often did not do so. He did not inform the investors of this and instead misrepresented to them that he had used their money to trade stocks and that the trading had resulted in profits.

Beginning in about 2004, Mr. Merriman completely stopped trading. He nevertheless continued until February 24, 2009, to accept funds from investors and continued to misrepresent to the investors that he was buying and selling stocks and that their investments were growing.

Mr. Merriman made the misrepresentations primarily through false account statements, which he sent to investors. An investor usually received one monthly statement for each limited liability company in which he or she participated. Mr. Merriman sent these false account statements as a way of executing his scheme, and he did so through the United States Postal Service and, in some cases, by e-mail. These false account statements included one for LLC-3, which the investors Davis and Loraine McCann received by mail at their home in Parker, Colorado, in early February 2005.

The account statements were false in several ways. A typical misrepresentation was that an investor had earned a certain amount of money in "Capital Gains." Other statements contained graphs falsely representing that a limited liability company's performance was on an upswing and comparing it to the downward trend of the Standard & Poors 100 index (a measure of the performance of major companies). Investors

relied on the statements in deciding to maintain their investments with Mr. Merriman and to invest additional funds with him.

Mr. Merriman converted to his own use and benefit the money that he did not use to trade. He used this money to purchase works of art, motor vehicles (including antique cars), a motor home, other luxury items and sports memorabilia, to travel to various parts of the world, and to make donations to his church. He also invested some of the money in two companies that were involved in a real estate development in Idaho, and he did so without informing the investors.

Investors sometimes asked Mr. Merriman for the return of funds that they had invested or to draw out the money that they believed they had earned. Mr. Merriman often tried to persuade the investors to not make withdrawals, but when investors insisted, he transferred money to them using funds from other investors. He never disclosed that this was what he was doing but instead misrepresented to the investors that they were taking out their principal investments and profits that had been earned.

Mr. Merriman used the proceeds of the scheme set out above to purchase the assets to be forfeited.

The government's position is that at least sixty-eight of the individuals and at least seven of the entities that invested in Merriman's partnership and limited liability companies lost approximately $21,010,702.73 as a result of the scheme described above.[1] Mr. Merriman reserves the right to challenge these figures.

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[1] These figures are based on the government's current analysis of records received from investors, banks, the defendant and his accountant. The government reserves the right to revise these figures if it obtains additional information prior to the sentencing hearing.

In March 2009, Mr. Merriman's attorney contacted the United States Attorney's Office and explained that his client wanted to confess to the scheme described above. On March 18, 2009, and again on April 28, 2009, Mr. Merriman and his attorney met with government representatives, and Mr. Merriman outlined the facts set out above.

Mr. Merriman's position is that the evidence also would establish the following: After meeting with the government on March 18, 2009, Mr. Merriman spent the next several days attempting to contact either via telephone or in person each of his investors who currently had money invested with him. He spoke to most of the investors, but a few did not return Mr. Merriman's telephone calls. He explained to each investor that he had engaged in a Ponzi scheme and apologized for his actions. Mr. Merriman also made a full confession to his family and his church, resulting in a divorce and an excommunication. Since reporting his crime to the United States Attorney's Office, Mr. Merriman has cooperated fully with the United States Attorney's Office, the Securities and Exchange Commission and individual investors and their attorneys.

V. SENTENCING COMPUTATION

Any estimation by the parties regarding the estimated appropriate guideline application does not preclude either party from asking the Court to depart from the otherwise appropriate advisory guideline range at sentencing if that party believes that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the sentencing guidelines. (§5K2.0)

The parties understand that the Court may impose any sentence up to the statutory maximum regardless of any advisory guideline range computed and that the Court

is not bound by any position of the parties. (§6B1.4(d)) The Court is free, pursuant to §§6A1.3 and 6B1.4, to reach its own findings of facts and sentencing factors considering the parties' stipulations, the presentence investigation and any other relevant information. (§6B1.4 Comm.; §1B1.4)

To the extent the parties disagree about the sentencing factors, the computations below identify the factors that are in dispute. (§6B1.4(b)).[2]

A. Government's Position

1. The base guideline is Section 2B1.1(a)(1), with a base offense level of 7.

2. The offense level should be increased by 22 because the loss was more than $20,000,000. U.S.S.G. § 2B1.1(b)(1)(L).

3. The offense level should be increased by 4 levels because the offense involved 50 or more victims. U.S.S.G. § 2B1.1(b)(2)(B).

4. The offense level should be increased by 4 levels because the offense involved violations of securities laws and, at the time of the offense, the defendant was an investment advisor. U.S.S.G. § 2B1.1(b)(17)(A). *See also* U.S.S.G. § 2B1.1, comment. (n. 14(A), (B)).[3]

5. The adjusted offense level would be 37.

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[2] The parties have used the November 2009 version of the *United States Sentencing Guidelines Manual.*

[3] If the court determines that guidelines section 2B1.1(b)(17)(A) applies, section 3B1.3 will not apply. U.S.S.G. § 2B1.1, comment. (n. 14(C)). If, however, the court decides that section 2B1.1(b)(17)(A) does not apply, the government's position will be that section 3B1.3 should apply. That would increase the offense level by 2 levels because the defendant abused a position of trust in a manner that significantly facilitated the commission and concealment of the offense. U.S.S.G. § 3B1.3.

6. The offense level should be reduced by 3 levels because the defendant clearly has demonstrated acceptance of responsibility for the offense and he has assisted authorities in the investigation and prosecution of his own conduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government and the court to allocate their resources efficiently. U.S.S.G. § 3E1.1.

7. The resulting offense level would be 34.

8. The parties understand that the defendant's criminal history computation is tentative. The criminal history category is determined by the Court. Known facts are that the defendant has no criminal history. Based on that information and if no other information were discovered, the defendant's criminal history category would be Category I.

9. Assuming those tentative criminal history facts, the career-offender, criminal-livelihood and armed-career-criminal adjustments would not apply.

10. The guidelines range resulting from the estimated offense level of 34 and the tentative criminal history category of I is 151 to 188 months. However, in order to be as accurate as possible, with the criminal history category undetermined at this time, the estimated offense level of 34 could conceivably result in an advisory guidelines range from 151 months (bottom of Category I) to 327 months (top of Category VI).

11. Pursuant to guidelines §5E1.2, assuming the estimated offense level of 34, the fine range for the offense would be $17,500 to $175,000 plus applicable interest and penalties.

12. Pursuant to guidelines §5D1.2, if the Court imposes a term of supervised release, that term shall be at least two years but not more than three years.

13. Restitution: The government's position at this time is that the restitution amount should be $21,010,702.73. The government reserves the right to revise that position if it obtains additional information prior to the sentencing hearing.

B. Defendant's Position

1. The base guideline is Section 2B1.1(a)(1), with a base offense level of 7.

2. The offense level should be increased by 20 because the loss was more than $7,000,000 but less than $20,000,000. U.S.S.G. § 2B1.1(b))(1)(K).

3. The offense level should be increased by 4 levels because the offense involved 50 or more victims. U.S.S.G. § 2B1.1(b)(2)(B).

4. The adjusted offense level would be 31.

5. The offense level should be reduced by 3 levels because the defendant clearly has demonstrated acceptance of responsibility for the offense and he has assisted authorities in the investigation and prosecution of his own conduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government and the court to allocate their resources efficiently. U.S.S.G. § 3E1.1.

6. The resulting offense level would be 28.

7. The parties understand that the defendant's criminal history computation is tentative. The criminal history category is determined by the Court. Known facts are that the defendant has no criminal history. Based on that information and if no other information were discovered, the defendant's criminal history category would be Category I.

8. Assuming those tentative criminal history facts, the career-offender, criminal-livelihood and armed-career-criminal adjustments would not apply.

9. The guideline range resulting from the estimated offense level of 28 and the tentative criminal history category of I is 78 to 97 months. However, in order to be as accurate as possible, with the criminal history category undetermined at this time, the estimated offense level of 28 could conceivably result in an advisory guidelines range from 78 months (bottom of Category I) to 175 months (top of Category VI).

10. Pursuant to guidelines §5E1.2, assuming the estimated offense level of 28, the fine range for the offense would be $12,500 to $ 125,000 plus applicable interest and penalties.

11. Pursuant to guideline §5D1.2, if the Court imposes a term of supervised release, that term shall be at least two years but not more than three years.

12. Restitution: Mr. Merriman continues to review and analyze the documents bearing on restitution. He has voluntarily transferred millions of dollars worth of real and personal property to the government. The amount of restitution will be reduced by the money the government collects from the sale of the property. Mr. Merriman will provide his position on restitution prior to the date of sentencing.

VI. WHY THE PROPOSED PLEA DISPOSITION IS APPROPRIATE

The parties believe the advisory sentencing range resulting from the proposed plea agreement is appropriate because all relevant conduct is disclosed, the sentencing guidelines take into account all pertinent sentencing factors with respect to this defendant, and the charge to which the defendant has agreed to plead guilty adequately reflects the seriousness of the actual offense behavior.

This document states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings or assurances, express or implied. In entering this agreement, neither the government nor the defendant have relied, or are relying, on any terms, promises, conditions or assurances not expressly stated in this agreement.

Date: 12/2/09

Shawn Richard Merriman
Defendant

Date: 12/2/09

Patrick L. Ridley
Attorney for Defendant

Date: 12-1-09

Tim R. Neff
Assistant United States Attorney

Date: 12/1/09

Thomas M. O'Rourke
Assistant United States Attorney